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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 930

IRA LEE BURCH,
Petitioner,

vs.

THE HIBERNIA BANK, et al.,
Respondents.

Brief of Respondent The Hibernia Bank in Opposition to Petition for Writ of Certiorari to the District Court of Appeal, State of California, Second Appellate District

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Neither the case nor the decision below involves any federal question. The case concerns title to California realty and was disposed of purely on questions of California law.

QUESTIONS PRESENTED

Neither the first nor second of petitioner's questions (Pet. 2, 3) is presented, and the third involves no federal matter.

STATEMENT OF THE CASE*

In 1934 petitioner wished to obtain an oil and gas lease on certain California realty, already mortgaged to this respondent (hereinafter called "Hibernia"). The mortgage was in default, and extrajudicial foreclosure proceedings had already begun (App. 2). Under California law, the lease would be subordinate to the mortgage and would be wiped out by foreclosure.† Petitioner therefore obtained Hibernia's consent to the lease upon agreement "that the said lease should cease and terminate if oil in paying quantities was not produced" by May 29, 1937, later extended to March 1938 (App. 8).

Petitioner failed to find oil or gas within the extended time, his lease thus expired in 1938 by the terms of the agreement, and his quitclaim to Hibernia was recorded (App. 5).

Meanwhile, after the lease was obtained and in 1934 the mortgagor (Cebrian) filed a farmer's petition for composition with creditors (11 U.S.C. Sec. 203). He and his creditors then entered into a composition agreement which provided that Hibernia was to get from him a "clear title" to the land in satisfaction of the debt. In January 1935 the federal court entered its final order confirming this agreement and dismissing the proceedings (App. 2, 3). The agreement that Hibernia obtain "clear title" was then consummated by completing the foreclosure which had been held in abeyance during the pendency of the composition proceedings (App. 4).

In 1937 Hibernia filed suit in a California court to quiet title to the property, naming and serving petitioner as one of the defendants (App. 5). In due course petitioner appeared in the action by a verified pleading which stated that his lease had been obtained

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*The facts here summarized are taken from the opinion below, quoted in Appendix B to the petition; references are to that appendix.

†*Mercantile Trust Company v. Sunset, etc. Co.*, 176 Cal. 461, 464, 168 P. 1037.

by agreements with Hibernia whereby the lease should terminate if oil was not discovered by March 1938, that he had not discovered oil and gas by that date, and that "in accordance with the written agreement" he had delivered to the bank a *quitclaim* of all interest in the land, and that he "has no right, title, interest, equity or estate in or to said real property or any part or parcel thereof under said lease" (App. 9, fn. 3).

In 1940 a decree quieting Hibernia's title was entered and became final (App. 10). Hibernia then sold the property, and 8 years later persons claiming under the purchaser discovered oil. The respondents other than Hibernia are the purchaser and parties claiming under him (App. 6).

Five years later, in 1953, petitioner brought this suit seeking, not only to resusucitate his long dead lease, but to give it priority although born in inferiority. The suit was dismissed by the courts below.

REASONS FOR DENYING THE WRIT

1. The case was decided on the non-federal ground of res judicata.

This case was dismissed on the ground of *res judicata* (App. 16, 17), which is a non-federal ground. *Northern Pac. Ry. Co. v. Ellis,* 144 U.S. 458, 464; *Kenney v. Craven,* 215 U.S. 125. Petitioner's suit was one to establish a title to California realty superior to Hibernia. But in the prior action between the same parties, Hibernia had been decreed to have the superior title.

Petitioner attempts to extract a federal question by a chain of argument leading back to the Cebrian farmer-debtor proceedings of 1934-35, although he was not the farmer-debtor or a creditor of the farmer-debtor and therefore not party to those proceedings or to the composition or a person for whose benefit any federal court order was made. His claim is that his quitclaim to Hibernia and the decree against him in the quiet title suit were procured by fraud; the fraud consisted of Hibernia's telling him it had foreclosed the

mortgage, whereas the foreclosure was void, says he, for two reasons: First, by the mere act of agreeing with its mortgagor (Cebrian) to accept *clear title* in satisfaction of the debt, Hibernia extinguished the debt and therefore the security, leaving nothing to foreclose; in short, by agreeing to accept clear title in discharge of the debt, Hibernia lost both the debt and the title. Second, the federal court's order confirming the composition enjoined enforcement of liens on "the property of Edward Cebrian" during the period of a 3-year lease of the property to be given Cebrian by Hibernia after it obtained title (App. 3); and petitioner would construe this as enjoining Hibernia from foreclosing; in short, the order confirming the agreement that Hibernia should get clear title is to be construed as an injunction preventing it from doing so.

The merits of these contentions need not be discussed because they are but arguments by which petitioner would seek to establish a superior title.* *That title is no longer open to inquiry between him and Hibernia.* The 1940 judgment adjudicated the presence of whatever was necessary to sustain it, the absence of anything that would render it erroneous, the validity of whatever was necessary to give Hibernia a superior title, the absence of anything that would impair that title, and the unsoundness of any contention now made by petitioner to upset it. The petitioner argues (Pet. 23) that his present contentions were not presented or decided in the quiet title action, but a judgment forecloses all contentions which might have been made as well as those that were.

While the California law of *res judicata* is probably the same as the federal, *Commissioner v. Sunnen,* 333 U.S. 591, in any event it presents no federal question.

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*Petitioner's first argument ignores the rule of *Myers v. International Trust Co.,* 273 U.S. 380 (quoted Pet. 15) that on confirmation of a composition the parties "get what they 'bargained for', and no more." The bargain was that Hibernia would discharge the debt for a "clear title", not for a mere promise; the subsequent foreclosure, which was no longer precluded by the prior farmer-debtor proceedings, *Union Land Bank v. Byerly,* 310 U.S. 1, 8, was the mechanics of getting the clear title.

Petitioner's second argument is a patent misconstruction of the injunction. The injunction was to protect Cebrian in his 3-year leasehold.

The petition attacks the validity of the 1940 quiet title judgment on three grounds and cites arrays of California cases which he asks this Court to hold that the court below, a California court, misunderstood or misapplied (Pet. 21, 24). But each of these grounds and the meaning of these cases are state questions.

Petitioner's *first ground* (Pet. 19, 20) is that the California court which tried the old action was without jurisdiction as respects petitioner because, says he, a plaintiff's right to a decree in a quiet title action depends on its title at the inception of the suit, the quiet title action was commenced in 1937, and he had until 1938 to find oil. But whether a decree in a suit in a state court may be based on the facts existing at the time the decree is entered or is confined to the facts existing at the commencement of the suit is purely a question of state practice.

Second (Pet. 20, 21), petitioner asserts that the decree in the old action varied from the prayer of the complaint, he notes that he filed no answer in that suit, and he argues that in such a situation a California statute prohibits a variance of decree from prayer. But whether there was a prohibited variance within the meaning of the California statute is a California question, not a federal, as is the consequence of the fact that petitioner himself filed a disclaimer of rights in the action.

Petitioner's *third* ground (Pet. 22-24) is that Hibernia defrauded him into letting the judgment of 1940 be entered. But petitioner had been served with summons and had the opportunity for his day in court. In these circumstances, what kind of fraud, if any, will permit a state judgment to be nullified in a different action in a state court is a state question. In these matters California draws a distinction between "extrinsic" and intrinsic fraud". The California distinction is probably the same as the federal, *U. S. v. Throckmorton,* 98 U.S. 61, but in any event how California courts choose to treat their own judgments is solely a question of California law.

2. Nor do the issues behind the 1940 judgment present a federal question.

As noted, the question whether the mortgage foreclosure was void because of the composition proceedings has *not* been passed on by the court below. Moreover, that question need never be reached and probably would not, even if the case were to proceed without the bar of *res judicata;* the case would go off on other issues. Thus this Court is being asked to grant a writ in order to render an advisory opinion on abstract questions not decisive of the lawsuit. Petitioner's case therefore rests on no federal basis, *Kenney v. Craven,* 215 U.S. 125, as is readily shown.

On the threshold, unless petitioner could obtain rescission of his quitclaim deed to Hibernia, he could have no case. He claims he was defrauded into giving that deed, and the claimed fraud consists of Hibernia's allegedly representing that it had foreclosed its mortgage while not disclosing what had happened in the Cebrian farmer-debtor proceedings (App. 4, 6). But the fact that the subject matter of misrepresentation by which one obtains a deed relates to what has happened in a federal court does not import into the defrauded person's claim a federal "title, right, privilege or immunity" under 28 U.S.C. Sec. 1257(3). Let it be assumed that as a consequence of the composition proceedings, the foreclosure was void, and that if the issue were to come before this Court in a proper case it would so hold. That holding would not determine petitioner's right to recover. There would still be, for example, the factual questions whether Hibernia had made the alleged representation, whether petitioner was ignorant of what had happened in the composition proceedings, whether in giving his quitclaim he relied on anything Hibernia stated. And there would be legal questions whether the alleged statements, if made, constituted actionable fraud entitling petitioner to a rescission of his quitclaim, and whether he was guilty of laches or barred by limitations. These are all state questions, and a determination of any one of them

adverse to petitioner would make it unnecessary even to consider the so-called federal questions.

Again, petitioner's claimed title rests on his old lease. That lease did not originate in the proceedings in the federal court. It arose from a prior contract among petitioner as lessee, Hibernia as prior mortgagee, and Cebrian as lessor-mortgagor, whereby, as amended, the lease was to end unless oil should be found by petitioner by 1938. The lease was created by California law, it was a California contract, and by its terms it ceased in 1938 because oil had not been found by then. What transpired in Cebrian's farmer-debtor proceedings, to which petitioner was not a party, is irrelevant. The effect of those proceedings on the rights of Cebrian, the debtor, as against Hibernia, the creditor, may have been a federal question. But Cebrian's rights are not involved in this suit. Were it to be determined that the foreclosure was void and that consequently Hibernia never obtained the fee, that would not entitle petitioner to recover against Hibernia in this suit. It is elementary California law that in a suit to quiet title a plaintiff's "right to recover must rest on the strength of his own title—not the weakness of defendants'." *Rockey v. Vieux,* 179 Cal. 681, 178 Pac. 712. Thus in his suit against Hibernia petitioner could not prevail by arguing that there was a defect in Hibernia's title because of the composition proceedings. Petitioner would be defeated under California law without ever reaching any question about the composition.

CONCLUSION

We respectfully submit that the petition should be denied.

Dated: San Francisco, California, May 7, 1957.

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